

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PERRY SHENELLE JACKSON,

Defendant-Appellant.

UNPUBLISHED

April 4, 1997

No. 192120

Berrien Circuit Court

LC No. 94-004219-FC

Before: D.F. Walsh,* P.J., and R.P. Griffin** and W.P. Cynar,* JJ.

MEMORANDUM.

Defendant pleaded guilty to second-degree murder, MCL 750.317; MSA 28.549, and was sentenced to life imprisonment. He appeals as of right. We affirm. This case has been decided without oral argument pursuant to MCR 7.214(E)(1)(b).

Defendant argues that the court abused its discretion in scoring twenty-five points rather than ten points for Offense Variable 3 since the killing occurred in a combative situation. The instructions for OV 3 provide, in part, that ten points should be scored when the killing is intentional within the definitions of second-degree murder or voluntary manslaughter but the death occurred in a combative situation. Sentencing Guidelines (2d ed, 1988) p 77. *In People v Rodriguez*, 212 Mich App 351, 353; 538 NW2d 42 (1995), this Court noted that Random House Webster's College Dictionary (1992) defines "combative" as "ready or inclined to fight, pugnacious." Here, there was evidence to support the court's conclusion that a combative situation did not exist where defendant approached the unarmed victim, the two men had words and when the victim turned to walk away, defendant fatally shot him. Since the evidence indicates that the victim was not "inclined to fight," a combative situation

*Former Court of Appeals judges, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

**Former Supreme Court justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

did not exist and the court did not abuse its discretion in scoring OV 3. *People v Ayers*, 213 Mich App 708, 723; 540 NW2d 791 (1995).

Defendant also argues the court failed to articulate adequate reasons for its substantial departure from the guidelines' recommendation of ten to twenty-five years' imprisonment and that his life sentence is disproportionate. Departures from the guidelines' ranges are appropriate when the guidelines do not adequately account for factors which can legitimately be considered at sentencing. *People v Watkins*, 209 Mich App 1, 6; 530 NW2d 111 (1995). When departing from the guidelines range, a sentencing court must articulate factors not included within or adequately accounted for in the guidelines calculations to explain its departure. *People v Barclay*, 208 Mich App 670, 677; 528 NW2d 842 (1995). Here, the court noted the impact on the victim's family and the facts of the case, noting that there was very little mitigation on defendant's behalf. We agree with the lower court that the guidelines did not consider the egregious facts of the case which included defendant shooting the victim in the face and again in the legs after he fell to the ground. Moreover, in exchange for the plea, the prosecutor dismissed the original charges of open murder, possession of a weapon during the commission of a felony and carrying a concealed weapon. In addition, the prosecutor agreed to dismiss a separate case charging defendant with assault with a deadly weapon, felony-firearm and carrying a concealed weapon. A sentencing court's consideration of factors not adequately addressed in the sentencing guidelines is more compelling where a conviction has been obtained as a result of a guilty plea offered in exchange for dismissal of other charges or of a lesser offense. *People v Duprey*, 186 Mich App 313, 318; 463 NW2d 240 (1990). Under the facts of the case, defendant's life sentence does not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ Daniel F. Walsh

/s/ Robert P. Griffin

/s/ Walter P. Cynar